**Enterprise Leasing Company-Southeast, LLC *and* International Brotherhood of Teamsters, Local 391.** Case 11–CA–073779

October 2, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding.[1] Pursuant to a charge filed by the Union on February 3, 2012,[2] the Acting General Counsel issued the complaint on February 27, 2012, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 11–RC–006746.[3] The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On March 14, 2012, the Acting General Counsel filed a Motion for Summary Judgment. On March 16, 2012, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

On April 18, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 35. The Board filed an application for enforcement of the order in the United States Court of Appeals for the Fourth Circuit. The court consolidated the case for oral argument and decision with *Huntington Ingalls, Inc. v. NLRB* (4th Cir. No. 12–2065).

On July 17, 2013, the court denied enforcement of the Board's order. *NLRB v. Enterprise Leasing Co.-Southeast, LLC*, 722 F.3d 609, 660 (2013). At the time of the Board's order, three of the five members of the Board were serving pursuant to January 2012 appointments that had been challenged as constitutionally infirm. The court's denial of enforcement was based on its conclusion that the January 2012 appointments were invalid, and that the Board therefore lacked a quorum to act at the time that it issued the order. Id. at 612–613, 660. The Board filed a petition for rehearing for the limited purpose of requesting that the court's order be modified to include language explicitly remanding the case to the Board for further proceedings consistent with the court's decision. The petition was summarily denied.

The Board subsequently filed a petition for certiorari. After the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), which held the January 2012 appointments invalid, the Court denied the Board's petition.

By letter dated August 15, 2014, the Executive Secretary notified the parties that, in view of the determination that the Board that had previously decided the case was not properly constituted, the Board would now "consider the case anew and . . . issue a decision and order resolving the complaint allegations." Thereafter, the Respondent filed a letter objecting to any further action by the Board, arguing that in the absence of a remand from the court the Board lacks jurisdiction over this case.

Respondent's Objection to Consideration of Motion for Summary Judgment

The threshold issue is whether, in light of the denial of enforcement, the Board may consider this case anew. The sole basis of the decision denying enforcement was the court's conclusion that the January 2012 appointments were invalid, and that the Board thus lacked a quorum when it issued its order. See 722 F.3d at 612–613, 660. The court's denial of enforcement was not based on the merits of the unfair labor practice findings; to the contrary, the court held that the Board's determination on the merits of the case was supported by substantial evidence. Id. at 620. The clear import of the court's decision denying enforcement, along with the Supreme Court's *Noel Canning* decision, is that no validly constituted Board has ruled on the General Counsel's motion for summary judgment. The motion is therefore still pending before the Board, and the Board is free to address it.

This conclusion is consistent with the court's denial of the Board's petition for rehearing. In the petition, the Board stated its view that the court's decision clearly contemplated the possibility of further proceedings before a validly constituted Board:

> The Court's denial of enforcement is not based on the merits of the Board's unfair labor practice determinations, but *solely* on the Court's determination that the recess appointments to the Board were unconstitutional, and that the Board orders, issued without a Board quorum, therefore "must be vacated." [722 F.3d at

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Union also filed an amended charge on February 22, 2012, but it was later withdrawn.

[3] 357 NLRB No. 159 (2011). Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).

> 660.] Accordingly, it follows that the Court's decision is to be read as anticipating the possibility of issuance of new Board orders.

Petition for Rehearing at 3–4, *NLRB v. Enterprise Leasing Co.-Southeast, LLC*, supra (No. 12–1514) (emphasis in original). Notwithstanding this understanding of the meaning of the denial of enforcement for further proceedings before the Board, the Board requested the inclusion of explicit remand language, in order to avoid the possibility of needless litigation concerning the issue. Because the petition was denied without explanation, no inference can be drawn that the denial was inconsistent with the clear import of the order denying enforcement.[4]

Finally, consideration of the motion at this time is consistent with the treatment in the courts of appeals of other cases in which enforcement was denied for lack of a Board quorum at the time the original decision was issued, and the Board then considered the case again and issued a new decision. The issue was presented squarely in *NLRB v. Whitesell Corp.,* 638 F.3d 883 (8th Cir. 2011). The court had denied enforcement of the Board's original order because the Board had lacked a quorum under *New Process Steel, L.P. v. NLRB,* 560 U.S. 674 (2010),[5] and the Board issued a new decision and order. The court enforced the new order, rejecting the respondent's argument that the Board lacked jurisdiction to redecide the case:

> In the prior action, the only question presented was whether to enforce the NLRB's order. Relying on the *New Process* decision, we denied the application for enforcement because the prior NLRB decision, reached while there were only two members of the Board, was invalid. On that issue, our decision is final. See 29 U.S.C. § 160(e).
>
> We have yet to determine whether Whitesell violated the NLRA. Our prior denial does not preclude the Board, now properly constituted, from considering this matter anew and issuing its first valid decision. . . . . The Board properly read our denial of the application for enforcement as based solely on the *New Process* decision. We now address the merits of the Board's decision for the first time.

638 F.3d at 889. Similarly, in *NLRB v. Domsey Trading Corp.,* 636 F.3d 33 (2d Cir. 2011), the court addressed the merits of a Board decision readdressing a case in which it had denied enforcement of a prior decision based on *New Process Steel.* See *NLRB v. Domsey Trading Corp.,* 383 F. App'x 46 (2d Cir. 2010); *NLRB v. Domsey Trading Corp.,* 636 F.3d at 34 fn. 1.[6] Accordingly, we proceed to consider the General Counsel's motion.[7]

Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its objections to conduct alleged to have affected the results of the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).[8]

Accordingly, we grant the Motion for Summary Judgment.

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[4] See, e.g., *Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1483 (Fed. Cir. 1998) (motion for clarification); *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (petition for rehearing or modification); *Luckey v. Miller*, 929 F.2d 618, 621–622 (11th Cir. 1991) (petition for rehearing en banc). Member Johnson did not participate in the prior representation case and concurs with the result in this proceeding, without needing to rely on the Board's view stated in its petition, above. Here, the Court indicated in its original opinion on review that the sole reason for declining to enforce the order was based on the invalid composition of the Board at that time; the Court did not give any explanation for its subsequent denial of the petition for rehearing that was filed by a constitutionally valid Board; and the Respondent has admittedly refused to bargain while not raising any representation issues that are properly litigable in an unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Given those circumstances, Member Johnson concurs here.

[5] *NLRB v. Whitesell Corp.,* 385 F. Appx. 613 (8th Cir. 2010). As in the instant case, the court had also summarily denied a post-decisional motion by the Board for remand or clarification. 638 F.3d at 888.

[6] See also *NLRB v. Whitesell Corp.,* 638 F.3d at 889 (While "the *Domsey Trading* court declined the invitation to clarify its denial decision," it "anticipated further proceedings before the NLRB" and, after "the case was reconsidered by the Board, . . . addressed the merits of the Board's decision").

[7] *NLRB v. Lundy Packing Co.,* 81 F.3d 25 (4th Cir. 1996), relied on by the Respondent in opposing consideration of the General Counsel's motion, is inapposite. In that case, the court had denied enforcement of a prior Board order in the case, on the merits. Here, decisively, the court's denial of enforcement of the prior order was not a final judgment on the merits of the case. See *Whitesell,* 638 F.3d at 889.

[8] The Respondent's motion that the complaint be dismissed in its entirety is therefore denied.

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

At all material times, the Respondent, a company with an office and place of business in located at the Raleigh-Durham airport in Raleigh, North Carolina, has been engaged in the rental of vehicles at the Raleigh-Durham airport.

During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its operations described above, derived gross revenues in excess of $500,000 and purchased and received at its facility goods and materials valued in excess of $5000 directly from points located outside the State of North Carolina.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Brotherhood of Teamsters, Local 391, is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. The Certification*

Following the representation election held on December 16 and 17, 2010, the Union was certified on December 29, 2011, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All hourly full-time and regular part-time greeter, exit booth agents, counter representatives, rental agents, handheld agents, bus drivers, service agents, customer service representatives, push/pullers and mechanics employed by the Employer at its Alamo and National car rental facility located at its Raleigh-Durham airport facility; but excluding all salaried employees, technical employees, office clerical employees, and guards, professional employees, and supervisors as defined in the National Labor Relations Act, as amended.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

#### *B. Refusal to Bargain*

At all material times, Adam Schneider held the position of regional vice president of the Respondent and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

About January 17, 2012, the Union, by letter, requested that the Respondent recognize the Union and bargain collectively with it. Since about January 23, 2012, the Respondent has refused to recognize and bargain with it. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing, since January 23, 2012, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord: *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir.), cert. denied 379 U.S. 817 (1964).

## ORDER

The National Labor Relations Board orders that the Respondent, Enterprise Leasing Company-Southeast, LLC, Raleigh, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Teamsters, Local 391, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

All hourly full-time and regular part-time greeter, exit booth agents, counter representatives, rental agents, handheld agents, bus drivers, service agents, customer service representatives, push/pullers and mechanics employed by the Employer at its Alamo and National car rental facility located at its Raleigh-Durham airport facility; but excluding all salaried employees, technical employees, office clerical employees, and guards, professional employees, and supervisors as defined in the National Labor Relations Act, as amended.

(b) Within 14 days after service by the Region, post at its facility in Raleigh, North Carolina, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director of Region 11 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. October 2, 2014

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| Mark Gaston Pearce, | Chairman |
| Kent Y. Hirozawa, | Member |
| Harry I. Johnson, III, | Member |

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Teamsters, Local 391, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All hourly full-time and regular part-time greeter, exit booth agents, counter representatives, rental agents, handheld agents, bus drivers, service agents, customer service representatives, push/pullers and mechanics employed by us at our Alamo and National car rental facility located at our Raleigh-Durham airport facility; but excluding all salaried employees, technical employees, office clerical employees, and guards, professional employees, and supervisors as defined in the National Labor Relations Act, as amended.

ENTERPRISE LEASING COMPANY–SOUTHEAST, LLC

The Board's decision can be found at www.nlrb.gov/case/11-CA-073779 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.